Nos. 16-3162 and 16-3271

U.S. Court of Appeals for the Seventh Circuit

HOBBY LOBBY STORES, INC.,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner,

and

COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE,
Intervening Respondent.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, NO. 20-CA-139745

BRIEF OF PETITIONER / CROSS-RESPONDENT HOBBY LOBBY STORES, INC.

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DISCLOSURE STATEMENT

(1) The full name of every party that the attorneys represent in the case (if the party is a Corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3);

Hobby Lobby Stores, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court:

Ogletree, Deakins, Nash, Smoak & Stewart P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A.

s/Ron Chapman, Jr.

s/Christopher C. Murray

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under 29 U.S.C. § 160(f) because Hobby Lobby Stores, Inc., ("Hobby Lobby") is aggrieved by a final order of the National Labor Relations Board ("NLRB" or "Board"). The Board issued its Decision and Order in *Hobby Lobby Stores, Inc.*, Case 20-CA-139745, 363 NLRB No. 195 on May 18, 2016 (the "Order"). Hobby Lobby timely filed a petition for review on May 20, 2016, in the Fifth Circuit Court of Appeals. *See Hobby Lobby Stores, Inc. v. NLRB*, Case No. 16-60312 (5th Cir.). The Fifth Circuit transferred Hobby Lobby's petition to this Court on August 12, 2016. The Board filed its Cross-Application for Enforcement on August 25, 2016.

ISSUES PRESENTED

1. In concluding Hobby Lobby's Mutual Arbitration Agreement ("MAA") violates the National Labor Relations Act ("NLRA"), the Board relied on its decisions in *D.R. Horton, Inc.*, 357 NLRB 2257 (2012) ("*Horton I*"), *enf. denied in relevant part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II")* and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), *enf. denied in relevant part*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) ("*Murphy*

Oil II"). The Board's rationale differs from the reasoning of this Court's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). This Court is limited under the *Chenery* doctrine to reviewing the Board's rationale. Must the Court review the Board's reasoning in *D.R. Horton I* without substituting its own reasoning from *Lewis* and deny enforcement of the Board's Order because that reasoning is wrong?

2. The Board's authority is limited to the NLRA, which does not govern adjudicative procedures. Did the Board exceed its authority by purporting as a matter of federal labor policy to grant NLRA-covered employees a substantive right to invoke class action, collective action, and joinder procedures (collectively, "class procedures") created by other laws?

3. The Federal Arbitration Act ("FAA") mandates arbitration agreements be enforced according to their terms subject to certain exceptions. The Board has no authority to interpret the FAA. Did the Board err in holding Hobby Lobby's MAA unlawful and unenforceable despite the FAA because the MAA waives class procedures?

4. The record contains no evidence the MAA has inhibited any Hobby Lobby employee from filing a charge with the Board. The Court

may uphold the Board's findings only if supported by substantial evidence in the record. Must the Court refuse to enforce the Board's order because there is no substantial evidence Hobby Lobby violated the NLRA?

STATEMENT OF THE CASE

I. Hobby Lobby's Mutual Arbitration Agreement

Hobby Lobby is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products, operating approximately 660 stores in 47 states at the time this case was litigated. JA.238. Hobby Lobby is a party to a "Mutual Arbitration Agreement" ("MAA") with its applicants and employees (the "MAA"). JA.239-41. All Hobby Lobby employees must sign the MAA as a condition of employment. JA.239.

The MAA provides the "Employee" and the "Company" agree to submit certain employment-related claims ("Disputes") to final and binding arbitration in lieu of filing a lawsuit in court. JA.108-09, 168-69. By entering into the MAA, the Employee and the Company agree they "are giving up any right they might have at any point to sue each other." JA.109, 169.

The MAA provides the Employee and the Company will be the only parties to the arbitration of a Dispute under the MAA:

> The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party.

JA.108, 168.

The MAA also affirms it does not waive the Employee's right to file claims with governmental agencies (such as the NLRB):

> By agreeing to arbitrate all Disputes, Employee and Company understand that they ***are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).*** Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.

JA.108, 168 (emphasis added).

Applicants for employment with Respondent must sign a copy of the MAA that contains substantially the same provisions as those in the MAA with employees. JA.241.

II. Federal courts' repeated enforcement of the MAA

On December 3, 2013, Hobby Lobby moved the United States District Court for the Eastern District of California to dismiss, or

alternatively to compel arbitration of, a former employee's individual and representative wage-related claims under California law. *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) ("*Ortiz*"). JA.241.

On April 17, 2014, Hobby Lobby moved to dismiss a putative class action lawsuit alleging wage and hour claims under California law. *See Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN (C.D. Cal.) ("*Fardig*"). JA.214. Pursuant to the FAA, Hobby Lobby moved to compel individual arbitration under the MAAs of each of the named plaintiffs. *Id.*

On June 13, 2014, the *Fardig* court granted Hobby Lobby's motion to compel individual arbitration. *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The court rejected the argument the MAA was unenforceable under *Horton I*.

> The Court concludes that following the NLRB's reasoning on this issue would conflict with the [Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*,] and the Supreme Court's decision in *Concepcion* strongly favoring enforcement of arbitration agreements and strongly against striking class waiver provisions.

Id. at *7 (internal citations omitted). On October 1, 2014, the *Ortiz* court similarly granted Hobby Lobby's motion to compel, rejecting the

attempt to challenge the MAA as violating the NLRA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1077-1083 (E.D. Cal. 2014).

III. The Board's decision

The Charging Party filed the underlying unfair labor practice charge (the "Charge") against Hobby Lobby on October 28, 2014, challenging Hobby Lobby's MAA on various grounds. JA.236. On September 8, 2015, the ALJ issued her decision based on a stipulated record and found, under *Horton I* and *Murphy Oil I*, that Hobby Lobby violated the NLRA. JA.236, 242-44, 254-55. Hobby Lobby timely filed exceptions with the Board. JA.277. On May 18, 2016, the two-member majority of a Board panel issued its Order affirming the ALJ's decision in large part. JA.277-79.[1] Member Miscimarra dissented. JA.277-81.

The Board ordered Hobby Lobby to engage in various remedial actions, including reimbursing Ortiz, Fardig, and any other plaintiffs in *Ortiz* and *Fardig* for reasonable attorneys' fees and litigation expenses in opposing Hobby Lobby's motions to dismiss the collective lawsuits and compel arbitration, notwithstanding the fact that Hobby Lobby ***prevailed*** on both motions. JA.278.

[1] The Board did not rely on certain of the ALJ's findings that went beyond *Horton I*. JA.277 n.3.

SUMMARY OF THE ARGUMENT

In *Horton I*, the Board ruled – in conflict with the FAA – that the NLRA bars class action waivers in mandatory arbitration agreements. The Board based this extraordinary conclusion on an extraordinary premise: the NLRA grants employees a substantive right to access class procedures. The Board's attempt to locate this previously unknown "right" in the NLRA and its decision are wrong for at least five reasons.

First, the Board conflates employees' concerted ***assertion*** of alleged legal rights with courts' and arbitrators' collective ***adjudication*** of legal claims. The NLRA protects employees who assert their rights concertedly. The adjudication of legal claims, however, is governed by federal, state, and local rules of procedure or parties' arbitration agreements. The overwhelming majority of courts, including the Supreme Court, have concluded litigants do not possess substantive rights to procedures to obtain a collective adjudication of their claims and such procedures may be waived. Prior to *Horton I*, neither the Board nor any court had ever held employees possess a substantive right under the NLRA to those procedures.

Second, the Board has no authority to grant employees a substantive right to class procedures. The NLRA does not delegate to the Board the power to regulate procedures ***other*** decision-makers use to adjudicate legal claims under ***other*** statutes. The Board's attempt to do so conflicts with law outside the Board's jurisdiction and expertise, including the FLSA and the Federal Rules of Civil Procedure ("Federal Rules"). The Board's interpretation of Rule 23 as creating procedures to which employees have a substantive right under the NLRA also violates the Rules Enabling Act, which prohibits allowing the Federal Rules to enlarge or modify substantive rights.

Third, even if the Board had authority under the NLRA to determine what procedures must be available to employees in adjudicating their rights in other forums and under other laws, the Board has failed to balance the policies underlying the NLRA and FAA. The Board overestimates the role class procedures play in furthering the NLRA's purpose and ignores the policies behind the FAA favoring the enforcement of arbitration agreements.

Fourth, there is no evidence Ortiz ever engaged in any concerted activity with any other employee for their mutual aid or protection.

Fifth, the Board's award of attorneys' fees and expenses against Hobby Lobby for successfully moving federal courts to enforce the MAA violates Hobby Lobby's First Amendment right to petition.

ARGUMENT

I. Standard of Review

A. This Court may not defer to the Board's decision because it interprets law other than the NLRA and is an impermissible construction of the NLRA.

"[C]ourts do not defer to the Board when it decides a legal question beyond its expertise." *Roundy's Inc. v. NLRB*, 674 F.3d 638, 646 (7th Cir. 2012) (citation omitted). This Court reviews *de novo* the Board's interpretation of law outside the NLRA, including other federal statutes and contracts. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) (not deferring to the Board's interpretation of the Bankruptcy Code); *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1028 (7th Cir. 1990) ("We owe the Board no special deference in matters of contractual interpretation.").

Courts also may not defer to the Board's interpretations of the NLRA that are not rational and consistent with the Act. *NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994). The

Board's constructions of the NLRA must be reasonable and permissible. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). Although the Board may balance conflicting interests in formulating national labor policy, *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 499 (1960), courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Courts must decline to defer to the Board's interpretations where they attempt to usurp "major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). *See also Ins. Agents' Int'l Union,* 361 U.S. at 499 ("[T]he Board's resolution of the issues here amounted . . . to a movement into a new area of regulation which Congress had not committed to it."); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip

into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'").

In determining the degree of deference owed, courts also "consider the consistency with which an agency interpretation has been applied." *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 124 n.20 (1987). An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" that receives no deference. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). *See also NLRB v. Bell Aerospace Co. Div. of Textron,* 416 U.S. 267, 289 (1974) (rejecting Board's new interpretation of the NLRA).

This Court may not uphold the Board's findings of fact that are unsupported by "substantial evidence in the record as a whole." *United Elec., Radio & Mach. Workers of Am. (UE) v. NLRB*, 580 F.3d 560, 563 (7th Cir. 2009) (citations omitted). *See also NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979).

B. This Court must review the Board's reasoning and not substitute its own.

In reviewing the decision of an administrative agency such as the NLRB, it is "the foundational principle of administrative law that a

court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. E.P.A.*, _ U.S. _, 135 S. Ct. 2699, 2710 (2015). Under the *Chenery* doctrine:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. ***If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.***

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasis added); *see also Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 709 (7th Cir. 2012) ("[T]he judiciary . . . must affirm, or not, based on the agency's rationale."); *Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010) (noting an agency has the responsibility to "articulate reasoned grounds of decision based on legislative policy and administrative regulation"); *Moab v. Gonzales*, 500 F.3d 656, 659 (7th Cir. 2007) ("[W]e may uphold the [agency's] determination . . . 'if at all, on the same basis articulated in the order by the agency itself.'" (citation omitted)); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 322 (7th Cir. 1995); *NLRB v. Indianapolis Mack Sales & Serv., Inc.*, 802 F.2d 280, 285 (7th Cir. 1986).

Here, the Board applied its decisions in *Horton I* and *Murphy Oil I* without supplying independent reasoning. JA.277. Therefore, this Court must review the reasoning articulated by the Board in *Horton I* and reaffirmed in *Murphy Oil I* without substituting its own reasoned grounds. In particular, this Court must review the Board's decision without substituting the reasoning of this Court's decision in *Lewis*, 823 F.3d 1147, which was in a different procedural posture. In *Lewis*, the defendant/employer appealed from a district court order refusing to enforce an employment arbitration agreement that contained a waiver of class procedures. Here, Hobby Lobby petitions for direct review of a Board decision. Significantly, this Court, in concluding the agreement at issue in *Lewis* was unenforceable, did not incorporate or repeat the Board's reasoning in *Horton I* and its progeny. *Id.* at 1151. Rather, the *Lewis* Court engaged in an independent analysis of the text, history, and purpose of the NLRA and FAA.

The reasoning of *Lewis* and *Horton I* (and thus the Board decision here) differ substantially. *See* 823 F.3d at 1151-56. The most significant difference between *Lewis* and *Horton I* is *Lewis*'s conclusion that

Section 7 ***unambiguously*** covers "collective lawsuits."[2] ***Under* Lewis*'s* *rationale, the Board lacks authority to hold otherwise.*** *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). The Board, on the other hand, assumed it had authority to construe Section 7 to cover access to class procedures as a matter of federal labor policy. *See* 357 NLRB at 2284, 2287-88.[3] In addition, unlike the Board in *Horton I*, the *Lewis* Court:

- Analyzed Section 7's text using dictionary definitions of "concerted" and "activities" that are absent from the Board's decisions, *id.* at 1153;

[2] The Ninth Circuit similarly held Section 7 is "unambiguous" in this regard and there was "no need to proceed to the second step of *Chevron*." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016).

[3] The Board also did not argue in its *amicus* brief in *Lewis* that Section 7 was unambiguous but relied on its authority to construe Section 7. *See Lewis*, No. 15-2997, NLRB *Amicus* Br. at 8-9 (7th Cir. Dec. 16, 2015) (the "Board's construction of Section 7 to encompass concerted legal activity . . . is supported by longstanding Board and court precedent, and reflects the Board's judgment that legal activity accomplishes the congressional goal of avoiding strife and economic disruptions with particular effectiveness").

- Concluded Section 7's "concerted activity" unambiguously applies to "collective lawsuits," "the plain language of Section 7 encompasses [collective legal proceedings]," and "Section 7's plain language controls, and protects collective legal processes," *id.* at 1153-54;
- Concluded Section 7 of the NLRA renders arbitration agreements waiving class procedures "illegal", *id.* at 1157; and
- Reasoned there is no conflict between the NLRA and the FAA because the FAA's savings clause provides arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and "[i]llegality is one of those grounds." *Id.*

In contrast, *Horton I*:

- Reviewed precedent to trace the Board's construction of "concerted activity" for "mutual aid and protection" to cover the collective pursuit of workplace grievances, including through litigation, 357 NLRB at 2278-79;

- Applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to hold a mandatory arbitration agreement waiving class procedures qualified as a workplace rule that expressly restricts protected activity, *id.* at 2280;
- Relied on cases finding certain individual employment agreements interfered with collective bargaining and were unenforceable as a matter of public policy, *id.* at 2280-81;
- Considered whether finding an arbitration agreement unlawful based on the Board's interpretation of the NLRA and the "core principles of Federal labor policy" would conflict with the policies underlying the FAA and, if so, whether it should undertake a "careful accommodation" of the policies of both statutes "to the greatest extent possible," *id.* at 2284;
- Found, to the extent the FAA conflicts with the NLRA, the FAA was repealed in relevant part by the NLGA, *id.* at 2288; and
- Concluded *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) and *AT&T Mobility LLC v. Concepcion*, 563

U.S. 333 (2011) were not controlling because the Board was not mandating class arbitration but instead holding an employer could "leave[] open a judicial forum for class and collective claims" to satisfy Section 7, *id*.

Under *Chenery*, this Court "must judge the validity of an administrative [order] solely on 'the grounds upon which the [agency] itself based its action.'" *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (citations omitted). Even if this Court were to conclude the Board reached the right result (which it did not) but for the wrong reasons, it could not enforce the Board's order. *See id.* at 942 ("We express no opinion as to the correct test of 'concerted activities;' we require only that the Board . . . reconsider this matter free from its erroneous conception of the bounds of the law.").

II. The FAA mandates enforcement of the MAA.

Confining itself as it must to the Board's reasoning, this Court should conclude the Board, in *Horton I* and its progeny, misinterpreted the FAA. The FAA provides arbitration agreements like the MAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see*

also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001) (holding the FAA generally applies to employment arbitration agreements). The statute reflects an "emphatic federal policy in favor of arbitral dispute resolution." *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344.

Parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Under Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds as exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339. For instance, complaints about the "[m]ere inequality in

bargaining power" between an employer and employee cannot void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Additionally, the Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.* at 30.

A party to an arbitration agreement "'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (citation omitted). Thus, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration ***cannot "go forward as a class action or class relief [cannot] be granted by the arbitrator."*** *Id.* at 31-33 (internal quotations and citation omitted) (emphasis added).

State and federal courts "must enforce the [FAA] with respect to all arbitration agreements covered by that statute." *Marmet Health Care Ctr. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1202 (2012) (per curiam). "That is the case even when the claims at issue are federal

statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___, 132 S. Ct. 665, 669 (2012) (citation omitted).

There is no congressional command for class procedures that overrides the strong mandate of the FAA. And, contrary to the Board's reasoning, the validity of Hobby Lobby's MAA is determined not by the NLRA, but by the FAA, which the Board has no authority to interpret.

A. Courts consistently enforce arbitration agreements containing class action waivers.

The MAA's provisions are ordinary and unexceptional. Before *Horton I*, numerous courts – including at least five Courts of Appeals – enforced under the FAA mandatory employment arbitration agreements waiving class procedures. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Vilches v. The Travelers Cos., Inc.*, 413 F. App'x 487, 494 & n.4 (3d Cir. 2011); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001).

On January 3, 2012, for the first time in the nearly 80-year history of the NLRA, the Board held in *Horton I* that the NLRA

prohibits the waiver of class procedures in employment arbitration agreements. 357 NLRB at 2277. The Fifth Circuit refused to enforce *Horton I. Horton II*, 737 F.3d 344. And scores of other federal and state courts, including the Second, Fifth, and Eighth Circuits, rejected *Horton I. See Murphy Oil I*, 361 NLRB No. 72 at 36 n.5 (Member Johnson, dissenting) (collecting citations); *see also Patterson v. Raymours Furniture Company, Inc.*, No. 15-2820-CV, 2016 WL 4598542, --- Fed. App'x ---- (2d Cir. Sept. 14, 2016); *Cellular Sales of Missouri, LLC v. NLRB,* 824 F.3d 772 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Disregarding this nearly universal judicial disapproval, the Board adhered to *Horton I* in *Murphy Oil I. Murphy Oil I*, slip. op. at 5-18. The Fifth Circuit again refused to enforce the Board's order. *Murphy Oil II*, 808 F.3d 1013. But invoking its nonacquiescence policy, the Board continues, as it did in this case, to apply *Horton I. Murphy Oil I*, slip op. at 2 n.17. And most courts continue to reject it.

Lewis broke with this overwhelming precedent to hold an employment arbitration agreement waiving class procedures violated

the NLRA and was unenforceable under the FAA. 823 F.3d at 1151. Notably, *Lewis* failed to cite or discuss *Stolt-Nielsen*, wrongly disregarded reasoning essential to *Concepcion*'s holding as *dicta*, and failed to adhere to the Supreme Court's rationale in those decisions that arbitration as protected by the FAA is presumptively ***bilateral***. *Lewis* has thus been criticized. *See, e.g.*, *Bekele v. Lyft, Inc.,* No. CV 15-11650-FDS, 2016 WL 4203412, at *20 (D. Mass. Aug. 9, 2016) (concluding "the Seventh Circuit's holding in *Lewis* would lead to consequences that are both odd and surely unintended").[4]

B. *Horton I*, on which the Board's decision was based, was wrongly decided.

The Board in *Horton I* misconstrued the FAA, which lies outside its authority.

1. *Horton I* wrongly rejected *Concepcion*'s authoritative interpretation of the FAA.

Whether or not the Board agrees with it, "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an

[4] The Ninth Circuit now holds the lawfulness of an employment arbitration agreement waiving class procedures hinges on whether it contains an opt-out provision. *Morris*, 834 F.3d at 982 n.4; *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014). The Ninth Circuit therefore also has parted ways with the Board, which holds opt-out provisions do not save such agreements. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), *enf. denied, On Assignment Staffing Servs., Inc. v. NLRA*, 2016 WL 3685206 (5th Cir. June 6, 2016).

authoritative interpretation of that Act." *Direct TV, Inc. v. Imburgia,* __ U.S. __, 136 S. Ct. 463, 468 (2015); *see also Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1048 (N.D. Cal. 2012) (concluding court was bound by *Concepcion*'s "statement of the meaning and purposes of the FAA" in determining whether FAA or NLRA controlled enforceability of arbitration agreement). However, in *Horton I*, the Board circumvented *Concepcion* by wrongly reasoning its ban on employment agreements waiving class procedures is allowable under the FAA because it is not limited to arbitration agreements. 357 NLRB at 2285. The Board reasoned its new rule does not treat arbitration agreements "less favorably than other private contracts" in violation of the FAA. *Id.*

In *Concepcion,* the Supreme Court rejected the same attempt to evade the FAA and struck down a California rule prohibiting class action waivers. *Concepcion,* 563 U.S. at 341-44. *Concepcion* recognized courts can exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *Id.* at 341-42. For instance, a court might find unconscionable all agreements that fail to provide for "judicially monitored discovery." *Id.* "In practice, of course, the rule would have a disproportionate impact on arbitration

agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* at 342. To avoid this result, the Court concluded the permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.* at 343 (citation omitted).

Therefore, a rule used to void an arbitration agreement is not saved under the FAA simply because it would apply to "any contract." The proper test is whether a facially neutral rule prefers procedures incompatible with arbitration and "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.*

Applying this test, the *Concepcion* Court held a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* at 346-51. Arbitration as protected by the FAA is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. *Id.* at 348. Such informality makes arbitration poorly suited to conducting class litigation with its heightened

complexity, due process issues, and stakes. *Id.* at 348-51. The Court reasoned:

> The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. ***Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.***

Id. at 344 (emphasis added).[5]

Horton I attempted to distinguish *Concepcion* by reasoning its decision did not require class arbitration. 357 NLRB at 2288. The Board claimed it required only the availability of class procedures in some forum, mandating employers ***either*** (i) permit class arbitration, ***or*** (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But that was a distinction without a difference. Like the California law, *Horton I* "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion,* 563 U.S. at 336. *Horton I*'s adding the option for parties to

[5] *Lewis* wrongly disregarded this reasoning, which was necessary to *Concepcion*'s holding, as *dicta*. 823 F.3d at 1157. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

avoid class arbitration by ***forgoing arbitration altogether*** does not reduce the degree to which the Board's ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Id.* at 336. Requiring a party to abandon the arbitral forum entirely to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration.[6]

2. *Horton I* wrongly interpreted *Gilmer* to conclude employees have a substantive right under the NLRA to obtain an adjudication of their legal claims by a particular means.

Horton I also wrongly reasoned an individual employment arbitration agreement waiving class procedures is unenforceable under the FAA because it requires employees to forgo a substantive statutory right in violation of *Gilmer*, 500 U.S. 20. *See* 357 NLRB at 2285-87. *Horton I*'s analysis was fundamentally inconsistent with the Supreme Court's reasoning in *Gilmer*. In considering whether arbitration would violate an employee's substantive statutory rights, *Horton I* looked to the wrong statute (the NLRA rather than the FLSA), failed to ask the correct question (whether the employee could vindicate his or her FLSA

[6] *Murphy Oil* dismissed *Concepcion* as dealing with federal preemption. *Murphy Oil*, slip op. at 9. But *Italian Colors* makes clear the *Concepcion* analysis applies equally to federal statutes. 133 S. Ct. at 2312.

rights effectively in arbitration), and came to the wrong answer (the arbitration agreement was unenforceable ***even if*** the employee could vindicate his or her FLSA rights effectively in arbitration).

The issue in *Gilmer* was whether a claim under the ADEA was subject to compulsory arbitration. *Gilmer,* 500 U.S. at 23. The Court observed, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26 (citation omitted). "[S]o long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (citation omitted).

The burden is on the party opposing arbitration to "show that Congress intended to preclude a waiver of a judicial forum" for the claim at issue. *Id.* at 26. The Court instructed "[i]f such an intention exists, it will be discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.* (citation omitted).

Contrary to *Gilmer* and every Supreme Court case on point, *Horton I* failed to treat as dispositive whether an employee could vindicate his statutory rights under the FLSA effectively under the arbitration agreement's procedures.[7] 357 NLRB at 2285-86 & n.23. Instead, the Board reasoned "the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA." *Id.* at 2285 (emphasis in original).

The Supreme Court concluded such differences between arbitration procedures and judicial procedures did not *per se* render arbitration unsuitable for adjudicating statutory claims. *Horton I* ignored this fundamental teaching of *Gilmer* and its predecessors. Instead, *Horton I* held an arbitration agreement, to be enforceable under the FAA and the Act, ***must*** allow an employee to invoke certain procedures in the course of obtaining an adjudication of his or her statutory claims.

[7] The Supreme Court's other cases considering whether arbitration would violate a statutory right likewise asked whether a party could enforce a particular statutory claim effectively in arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Strikingly, *Horton I* held an arbitration agreement was unenforceable even if the employee could vindicate his FLSA rights effectively under it. 357 NLRB at 2285-86 & n.23. *Horton I* deemed the arbitration agreement void ***solely due to the means*** it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication. That was the opposite of *Gilmer*'s rationale.

Additionally, *Horton I* failed to apply *Gilmer*'s test (later amplified by *CompuCredit*) and look to the relevant statutory text, the statute's legislative history, or an "inherent conflict" between arbitration and the statute's underlying purposes. *Gilmer,* 500 U.S. at 26. In *CompuCredit Corp.*, the Court applied this test and analyzed the text of the Credit Repair Organizations Act ("CROA") to determine whether Congress intended to override the FAA. *CompuCredit Corp.,* 132 S. Ct. at 669. The *CompuCredit* Court reiterated that ***if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms."*** *Id.* at 673 (emphasis added). Had *Horton I* explored Congress' intention regarding the preclusion of arbitration for FLSA claims (which the Board failed to do), it would have been compelled to

find FLSA claims are subject to arbitration. *See, e.g.*, *Carter*, 362 F.3d at 297 (holding "there is nothing in the FLSA's text or legislative history" and "nothing that would even implicitly" suggest Congress intended to preclude arbitration of FLSA claims).

Further, contrary to *Gilmer* (and *CompuCredit*), *Horton I* did not look for an indication in the NLRA's text or history of a congressional intent to override the FAA and require employees have access to class procedures. *Horton I* got the inquiry backwards, concluding "nothing in the text ***of the FAA*** suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." 357 NLRB at 2287 (emphasis added). If *Horton I* had asked the correct question, it would have found "there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA." *Jasso*, 879 F. Supp. 2d at 1047; *see also Horton II*, 737 F.3d at 360. Such "silence" in the NLRA means "the FAA requires the [MAA] to

be enforced according to its terms." *CompuCredit Corp.*, 132 S. Ct. at 673.[8]

Horton I also reasoned there was "an inherent conflict" between the NLRA and the arbitration agreement's waiver of class procedures but cited no authority for its conclusion. 357 NLRB at 2286. The Supreme Court has never voided an arbitration agreement on "inherent conflict" grounds. Rather, courts repeatedly have found ***no*** "inherent conflict" between arbitration and other statutes. *See, e.g.*, *Gilmer*, 500 U.S. at 27-29; *Rodriguez*, 490 U.S. at 485-86; *McMahon*, 482 U.S. at 242; *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680-81 (5th Cir. 2006). *Horton I*'s unfounded and unreasoned rationale to the contrary was an empty reference to *Gilmer* without analyzing its substance.

[8] The Board later conceded "the NLRA does not explicitly override the FAA." *Murphy Oil I,* slip op. at 10. It argued there was an "obvious reason" for this silence: when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not yet been applied to employment arbitration agreements, which only occurred much later in 2001. *Id.* Notably, *Murphy Oil I*'s new reasoning nullifies *Horton I*'s earlier rationale that Congress used the 1932 NLGA to repeal directly and the 1935 NLRA to repeal impliedly the 1925 FAA with respect to individual employment arbitration agreements decades ***before*** the FAA was recognized as applying to employment arbitration agreements. *Horton I,* 357 NLRB at 2288 & n.26.

3. *Horton I* erred in reasoning an arbitration agreement waiving class procedures is unenforceable on public policy grounds.

The FAA's savings clause does not permit the Board, as it has done, to declare an arbitration agreement waiving class procedures unenforceable as contrary to public policy.

a. *Horton I* improperly applied a common-law balancing test.

Incredibly, the Board treated the common law's "public policy" balancing test as giving it broad discretion to determine for itself whether the public policies underlying the NLRA and the NLGA rendered an arbitration agreement unenforceable despite the FAA's mandate and the absence of any indication that Congress intended to preclude individualized arbitrations. 357 NLRB at 2287-88.[9] No precedent exists for applying this balancing test under the FAA. Because the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy absent an equally

[9] The Board wrongly relied on *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), failing to note the NLRA provision at issue – Section 8(e) – ***expressly*** voids certain contracts. 357 NLRB at 2287.

clear congressional directive in another statute to the contrary. *See CompuCredit*, 132 S. Ct. at 672 (when Congress restricts the use of arbitration, it does so clearly). In *Horton I*, the Board improperly relied on its own weighing of public policies rather than deferring to congressional purpose. 357 NLRB at 2287-88.

b. There is no precedent for *Horton I*'s holding that arbitration agreements waiving class procedures conflict with the NLRA.

Horton I cited no decision during the NLRA's 80-year history holding a contract unenforceable because it interfered with employees' general "right to engage in protected concerted action." The Board cited only decisions in which courts enforced Board orders that specific employers cease and desist from enforcing individual employment agreements those employers used to interfere with specific, well-defined rights granted employees in Section 7, not the general "right to engage in protected concerted action."

Horton I failed to acknowledge Section 7's rights run from the well-defined and specific – the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing" – to the very general right "to engage in other

concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157. None of the decisions *Horton I* cited held an employment agreement unenforceable because it allegedly violated an employee's amorphous Section 7 right to engage in concerted activities for mutual aid or protection. 357 NLRB at 2280-81 & n.7.

In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), an employer refused to recognize a union and established a committee to negotiate individual employment contracts in lieu of collective bargaining. The Supreme Court found those individual contracts "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act." *Nat'l Licorice Co.,* 309 U.S. at 361.

Four years later, in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), an employer claimed it need not bargain collectively because it already had entered individual employment agreements with employees prior to a certification of the union as their exclusive bargaining representative. The Court did ***not void the individual agreements*** but held their existence did not excuse the employer from bargaining collectively

because each individual employment agreement would be superseded by the terms of any collective bargaining agreement. *J.I. Case Co.*, 321 U.S. at 336-38. The other decisions cited by *Horton I* all involved employers' use of individual employment agreements prior to *J.I. Case* to attempt to avoid employees' specific Section 7 rights to form or join labor organizations and engage in collective bargaining. 357 NLRB at 2280-81 & n.7.

Horton I wrongly reasoned these decisions held individual agreements unlawful because they "purport to restrict Section 7 rights." *Id.* at 4. But the Board's extrapolation went too far. *Cf., Webster v. Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (rejecting Board's overbroad characterization of *National Licorice*). Rather, the old decisions cited by *Horton I* affirmed the Board's remedial orders that specific employers cease enforcing specific individual agreements used in willful attempts to avoid collective bargaining. Those employers acted with anti-union animus and required individual agreements for the purpose of interfering with collective bargaining. *See also Johnmohammadi,* 755 F.3d 1076–77 (distinguishing *National Licorice*,

J.I. Case, and related cases from arbitration agreements waiving class procedures).

The differences between an employer's using individual employment agreements to obstruct collective bargaining and using individual arbitration agreements to resolve employment disputes are stark. An individual arbitration agreement does not and cannot avoid collective bargaining with a union.[10] Federal law and policy also recognize the legitimacy of employment arbitration and encourage it. *Circuit City Stores*, 532 U.S. at 122-23. The Supreme Court has also recognized the absence of class procedures in arbitration is reasonable and assumed. *Concepcion*, 563 U.S. at 344-52; *Stolt-Nielsen*, 559 U.S. at 685 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). The anti-union cases cited by the Board did not involve employers' entering individual agreements ***encouraged by federal policy as legitimate and beneficial***.

[10] Under *J.I. Case*, if a union came to represent Hobby Lobby's employees, and if the parties agreed upon a collective bargaining agreement ("CBA"), that CBA might supersede an individual arbitration agreement to the extent the CBA's terms varied from the arbitration agreement, but that is not the scenario presented here or in *Horton I*. *See Johnmohammadi*, 755 F.3d at 1076-77.

c. Requiring individual arbitration is not equivalent to retaliating against employees.

Horton I unreasonably equated requiring arbitration that waives class procedures as a condition of employment with retaliating against employees for exercising NLRA rights, relying on decisions in which employers terminated employees for filing lawsuits. 357 NLRB at 2278-79 & n.4. However, implementing an across-the-board individual arbitration program is not equivalent to firing employees because they sue their employer. The former involves action recognized by the law as legitimate. Again, federal law acknowledges individual employment arbitration yields benefits to the parties (including employees) and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. Therefore, when an employer declines to employ individuals who refuse to agree to individualized arbitration, the employer's actions are in furtherance of ends Congress and the courts have deemed legitimate and beneficial under the FAA.

4. *Horton I* erred in reasoning the NLGA trumps the FAA.

The Board was without authority to conclude the NLGA voided employment arbitration agreements with class action waivers and partially repealed the FAA. 357 NLRB at 2281-82, 2288. The Court must reject *Horton I*'s novel interpretation of the NLGA. Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his employment would terminate if he did – are unenforceable in federal courts. *Id.* § 103. The statute also provided that any agreement "in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." *Id.*

Horton I incorrectly concluded the NLGA "prohibit[s] the enforcement of . . . agreements comparable to" an individual

employment arbitration agreement. But *Horton I*'s extension of the NLGA to individual arbitration agreements distorted history and the statute. 357 NLRB at 2281.

First, when the NLGA was adopted in 1932, the Federal Rules, the FLSA, and the modern class action device did not exist. To suggest the NLGA manifests a Congressional intention that employees have a substantive, non-waivable right to invoke class procedures not yet adopted is absurd.[11]

Horton I's analogy to "yellow-dog" contracts also failed. If an employee promises to arbitrate individually and is hired, but then files a class action lawsuit in breach of the promise, an arbitration agreement like the MAA does not provide the employee's employment will terminate for having done so, as would occur under a "yellow-dog" contract. Rather, an employer will move to compel individualized arbitration under the FAA, with no effect on employment status.

Even assuming conflict exists between the NLGA and the FAA, it would be up to courts, not the Board, to resolve that conflict between

[11] *Lewis* cited no authority for its assertion "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA" in 1935. *Lewis*, 823 F.3d at 1154. Nor did *Lewis* or the Board cite any case from 1935, 1932, or earlier in which an employee brought a representative action for damages on behalf of other employees. *Cf. Concepcion*, 563 U.S.at 349 ("[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925.").

two federal statutes outside the Board's jurisdiction. *See, e.g.*, *Owens*, 702 F.3d at 1053. Courts would likely "reconcile" the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970). The Supreme Court has clarified the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted.

In *Boys Markets*, the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Boys Market, Inc.,* 398 U.S. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration to settle labor disputes. *Id.* at 252.

The Court found the NLGA "was responsive to a situation totally different from that which exists today." *Id.* at 250. When it was passed,

federal courts regularly entered injunctions "against the activities of labor groups." *Id.* To stop this, Congress passed the NLGA "to limit severely the power of the federal courts to issue injunctions" in cases involving labor disputes. *Id.* at 251. However, in following years, Congress' focus "shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* Because this "shift in emphasis" occurred "without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act," "it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.*

Here, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction must give way because of the FAA and subsequent developments. An arbitration agreement with a class action waiver is not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id.* at 251-52. An employment arbitration agreement is unrelated to the NLGA's core purpose of fostering the growth of labor organizations at

the dawn of the last century. Just as the LMRA manifests a strong congressional policy for labor arbitration, the FAA evinces a strong policy for the enforcement of arbitration agreements. Just as the NLGA must be viewed as accommodating Congress' intentions under the LMRA, so too must it accommodate Congress' intentions under the FAA.

Finally, *Horton I* got the chronology wrong. *Horton I* assumed the FAA was enacted in 1925 and predated both the NLGA and the NLRA, 357 NLRB at 2284, and therefore, if the FAA conflicted with either statute, the FAA must have been repealed, either by the NLGA's express provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.* at 2288 & n.26.

The Board, however, failed to account for the dates when the NLRA and FAA were ***re-enacted***, which are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to ***re-enactment*** date of the Railway Labor Act to determine it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail).

Congress enacted the NLGA in 1932; re-enacted the NLRA on June 23, 1947; and re-enacted the FAA on July 30, 1947. *See* 47 Stat. 70; 61 Stat. 136; 61 Stat. 670. Of these three statutes, the FAA is the most recently re-enacted. If any "irreconcilable conflict" existed among them, the FAA would prevail.

Realizing its mistake, in *Murphy Oil I*, the Board argued the FAA's reenactment in 1947 did not alter the NLGA or NLRA. It reasoned, "[i]t seems inconceivable that legislation effectively restricting the scope of the [NLGA] and the NLRA could be enacted without debate or even notice." *Murphy Oil I*, slip op. at 11. However, *Horton I* and *Murphy Oil I* nevertheless assume the enactment of the NLGA and NLRA restricted the 1925-enacted FAA regarding the enforceability of arbitration agreements "without debate or even notice." Rather than speculating which statute silently and impliedly repealed or amended the other, it is far more plausible to read the NLGA and NLRA as simply not in conflict with the FAA because neither of those statutes concerns the enforceability of individual employment arbitration agreements.

III. The NLRA does not create a substantive right to invoke class procedures.

Irrespective of the FAA's requirements, *Horton I* is also wrong for another and even more basic reason: the NLRA does not provide a non-waivable right to invoke class procedures. *Murphy Oil II*, 808 F.3d at 1016 (the "'use of class action procedures ... is not a substantive right' under Section 7 of the NLRA"). The Board's unprecedented holding far exceeded the Board's authority.

A. The text, history, and purpose of the NLRA have never been construed to grant employees a right to have their legal claims adjudicated collectively.

The plain text of the NLRA does not mention the procedures by which employees may seek to have employment-related claims adjudicated.[12] Despite the statute's silence, *Horton I* reasoned that employees' statutory right to act concertedly for mutual aid and protection includes a substantive right to invoke class procedures. 357 NLRB at 2278. However, the Board mis-cited cases showing only that Section 7 protects employees from retaliation for concertedly ***asserting*** they have certain legal rights (*e.g.*, by circulating petitions, making demands, and filing charges and complaints), not that Section 7 gives

[12] The Board did not reason otherwise in contrast to *Lewis*. *See* 823 F.3d at 1154.

employees a right to seek the collective ***adjudication*** of their legal claims (*e.g.*, by having their motions for class certification decided on their merits).

In *Horton I*, the Board mistakenly contended *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) recognizes a right to seek the collective adjudication of claims. 357 NLRB at 2278. In reality, *Eastex* addressed whether Section 7 protected a union's distribution of a newsletter touching on political issues outside the immediate employer-employee relationship. 437 U.S. at 563. The Court held this activity was protected because employees do not lose the protection of Section 7 when they seek "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565-67. For context, but not as a holding, the Court observed:

> Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause.

Id.

The Board ignored the fact that *Eastex* qualified this *dicta* regarding "resort to administrative and judicial forums" by declaring "***[w]e do not address here the question of what may constitute 'concerted' activities in this context.***" *Id.* at 566 n.15 (emphasis added).[13] *Eastex* also does not mention a purported right under Section 7 to invoke class procedures or seek the collective adjudication of claims.

The *Horton I* Board similarly missed the point of *Salt River Valley*. 357 NLRB at 2279. That case makes clear Section 7 provides employees a right to assert their employment-related legal rights concertedly, which differs from an alleged right to invoke class procedures in seeking an adjudication of legal claims. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). Critically, the employees in that case never sued. Rather, their concerted activities in asserting their legal rights all occurred ***outside*** any adjudicatory proceeding. That protected conduct involved the employees' attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or pooling resources to finance litigation. *Salt*

[13] *Lewis* likewise failed to recognize this statement was *dicta* and ignored the Supreme Court's qualification of it. 823 F.3d at 1152.

River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953). But the Board in *Horton I* failed to recognize that ***the employees' protected concerted activities in* Salt River Valley *did not utilize or depend on class litigation procedures.*** The Board identified no protected activities undertaken by the employees in *Salt River Valley* that an individual arbitration agreement like the MAA allegedly prohibits.

The other decisions cited by *Horton I* similarly lack any hint employees have a Section 7 right to collective adjudication procedures. Rather, those cases demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of employment. 357 NLRB at 2278-79 & n.4.

Before *Horton I*, no authority ever held Section 7 grants employees the right to have their employment-related legal claims adjudicated collectively. Section 7 concerns the bargaining process between employers and employees regarding the terms and conditions of employment. *See, e.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 845 (1984) ("[I]n enacting § 7 of the NLRA, Congress sought generally to

equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").

The adjudication of legal claims differs from bargaining; it is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed. 2009), adjudication; *see also Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins., Co.,* 559 U.S. 393, 408 (2010) (plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). The processes by which judges and arbitrators adjudicate legal claims are unrelated to Section 7's concern with equalizing bargaining power, and adjudicatory procedures like those under Rule 23 are beyond the NLRB's limited authority.

The cases cited by the Board (*e.g.*, *Eastex* and *Brady*) show only that jointly filing a legal complaint is one way employees concertedly assert legal rights, and employees who do so may be protected from retaliation under the NLRA. 357 NLRB at 2278 & n.4. However, many ways exist for employees to assert legal rights concertedly. Employees

do so through conversations and meetings with their employers, internal complaints and grievances, correspondence, petitions, postings, demonstrations, administrative charges, and settlement demands, among others. They also may do so by working together in filing multiple individual lawsuits or arbitration demands. All these activities allow employees to gain the advantages of solidarity to exert group pressure on their employer and increase bargaining power.

The Board does not – and could not – contend employees' individual claims somehow become stronger when decided collectively in a single proceeding. An employee who asserts his or her claim as a member of a 1,000-person class has no greater right under the FLSA or any other law than when he or she asserts the claim individually. Nor is an employee more likely to receive an adverse judgment when he or she seeks an adjudication of the claim in an individual proceeding. Judges and arbitrators must adjudicate each party's claims based on the law and facts, irrespective of the parties' power. *See, e.g.*, 28 U.S.C. § 453 (requiring each judge or justice of the United States to swear he or she "will administer justice without respect to persons, and do equal right to the poor and to the rich"). Section 7's concern with equalizing

employees' bargaining power with that of their employers has nothing to do with courts' and arbitrators' impartial adjudication of employees' legal claims.

In *Murphy Oil I*, the Board reasoned "as a practical matter, litigation routinely does involve not only adjudication by a court or arbitrator, but also bargaining between the parties: that is how cases settle, as most of them do." *Murphy Oil I*, *slip op.* at 18. But the Board lacks authority to grant employees a right to use ***class procedures as an economic weapon*** to force settlement.

Class certification can impose on defendants disproportionate costs and the risk of financial ruin in the event of an erroneous judgment, compelling them to settle class actions irrespective of the merits of the underlying claims. Commentators and courts have recognized this as a problem with class procedures. *See, e.g.*, *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The Federal Rules were amended in 1998 to allow interlocutory appeals from class certification decisions, in part because "[a]n order granting certification . . . ***may force a defendant to settle*** rather than incur the costs of defending a class action and run the risk of potentially ruinous

liability." *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments) (emphasis added); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

The Board lacks authority to treat this ***problem*** with class procedures – their imposing such substantial costs and risks they effectively prevent the adjudication of the underlying claims – as a ***benefit*** to which employees are entitled under Section 7 to equalize their bargaining power.

First, equal bargaining power in negotiating legal claims comes from the prospects of a ruling by a court or arbitrator on the merits based on the law and facts, not from imposing expenses and risks that compel settlement regardless of the merits. That is "judicial blackmail," not bargaining. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Second, any increase in bargaining power that class certification might give plaintiff-employees does not result from those employees' group activity; rather, it is a byproduct of court procedures imposing on defendants grossly disproportionate costs and risks. Class certification does not allow employee-plaintiffs just to "equalize" their bargaining

power with that of their defendant-employers but to far exceed it, ***irrespective of the merits of their claims***. In these circumstances, employees' invocation of class procedures is not a means of engaging in concerted activity for mutual aid and protection but the wielding of an economic weapon to force acceptance of their economic demands.

The Board's attempt to grant employees a substantive right under Section 7 to deploy judicial procedures as an economic weapon – a use irrelevant to the intended purposes of those procedures – is beyond the Board's authority. So, too, is the Board's attempt to bar employers from using individual arbitration agreements, consistent with the FAA, simply because they may blunt that economic weapon. *See, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) ("[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is

within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'"); *Ins. Agents' Int'l Union,* 361 U.S. at 499-500 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."). Just as the NLRA permits employers to blunt the effectiveness of an employee strike, so, too, must it permit an employer to implement an arbitration agreement consistent with the FAA even though it may blunt employees' ability to impose higher litigation costs on the employer to extort higher cost-of-defense settlements.

B. The right to engage in concerted activity does not necessitate banning individual arbitration agreements.

The Board also conflates invoking class adjudicatory procedures with concertedly asserting legal rights. *Horton I* ignored how employees

can act concertedly in asserting legal rights and claims that have nothing to do with class adjudication procedures. Irrespective of an individual arbitration agreement, employees can work together in asserting their common legal rights by (1) pooling their finances, (2) making joint settlement demands and negotiating as a group, (3) sharing information, (4) soliciting other employees to assert the same claims, (5) acting in concert to initiate multiple individual arbitrations asserting the same claims, (6) obtaining common representation, (7) jointly investigating their claims, (8) developing common legal theories and strategies, and (9) testifying on behalf of one another . *Cf.* Kenneth T. Lopatka, "A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Hobby Lobby's MAA does not prevent employees from acting concertedly in pursuing their individual arbitrations. *See, e.g.*, *Kicic v. Hobby Lobby Stores, Inc.*, Case No. 2:16-cv-197 (S.D. Ind. June 24, 2016), ECF No. 16-1 ("Affidavit of Rebecca S. Predovan") at ¶¶ 1-10 (noting two former Hobby Lobby employees represented by the same attorneys simultaneously filed individual arbitrations under the MAA alleging the same claims).

IV. The Board lacked authority under the NLRA to grant employees a new, substantive, non-waivable right to class procedures.

While the Board may have responsibility "to adapt the Act to changing patterns of industrial life," reviewing courts "are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *Weingarten,* 420 U.S. at 266 (citation omitted). The courts are charged with ensuring the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds*, 535 U.S. at 144.

The Board's reasoning in *Horton I* is not entitled to deference and is unreasonable and impermissible because it "wholly ignore[s] other

and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47. Those other objectives are well outside the Board's authority to define. *Horton I* does not solely, or even primarily, interpret the NLRA. Rather, the Board interpreted Section 7 to grant employees a substantive, non-waivable right to access ***judicial procedures that are created by, and exist solely by virtue of, laws other than the NLRA such as the FLSA and the Federal Rules***. The Board's attempt to recognize a new, substantive, non-waivable NLRA right to class procedures "trench[es] upon" not only the FAA but the Rules Enabling Act, the Federal Rules, and the FLSA, among other laws and policies outside the Board's expertise and authority.

A. The shifting positions of NLRB personnel demonstrate the lack of a purported NLRA right to class procedures.

The contradictory positions of Board representatives in handling the charge in *Horton I* demonstrate the Board changed its reasoning but without explaining why. The Board's new rule, which represents a substantial change in the law, is therefore not entitled to deference.

The Regional Director in *Horton* partially dismissed the unfair labor practice charge, concluding "***application of the class action***

mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant." JA.295 (D.R. Horton, Inc.'s Record Excerpts at Tab 7 ("Regional Director's partial refusal to issue complaint"), *Horton II*, No. 12-60031 (5th Cir. Aug. 29, 2008)). The Office of Appeals affirmed denial of the charge regarding class arbitrations but concluded the arbitration agreement "could be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit." JA.299 (D.R. Horton, Inc.'s Record Excerpts at Tab 6 ("Office of Appeals' ruling"), *Horton II*, No. 12-60031 (5th Cir. June 16, 2010)). This ruling was consistent with the Board General Counsel's Memorandum GC 10-06, which provided employers could "***lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful Gilmer agreement/waiver***." JA.308 (emphasis added). The ALJ in *Horton* then ruled he was "***not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims***." *Horton I,* 357 NLRB at 2292 (emphasis added). The Acting General Counsel, in

excepting to the ALJ's decision, argued "***an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement***." *See* JA.311 (Acting General Counsel's Reply Brief to Respondent's Answering Brief, *In re D.R. Horton, Inc.*, No. 12-CA-025764 (NLRB Apr. 25, 2011) (emphasis added)). Finally, *Horton I* – diverging from these positions – held the waiver of class procedures violates the NLRA. *Horton I,* 357 NLRB at 2277. The Board's failure to explain its changing position prevents deference to its decision. *Encino Motorcars*, 136 S. Ct. at 2125–26.

B. A purported NLRA right to class procedures conflicts with the Rules Enabling Act and the Federal Rules of Civil Procedure.

The Board's attempt to create a substantive, non-waivable right to class procedures also would violate the Rules Enabling Act ("REA"), which the Board failed to cite or address. In the REA, Congress delegated authority to the Supreme Court to promulgate the Federal Rules. 28 U.S.C. § 2072(b). The REA expressly provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.*

In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, a plurality of the Supreme Court differentiated a "substantive right" from a procedural one, explaining a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 559 U.S. at 406 (internal quotation marks and citation omitted). Regarding the validity under the REA of the Federal Rules' various joinder mechanisms, the plurality opinion reasoned Rule 23 is permissible because:

> A class action, no less than traditional joinder (of which it is a species), ***merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.***

Id. at 408 (emphasis added).

Horton I erroneously treated Rule 23 as enlarging substantive rights under the NLRA and abridging them under the FAA. On one hand, the Board contended employees have a substantive right under the NLRA to invoke Rule 23 and seek class certification. But a "right" to invoke Rule 23 could not exist without the rule itself. Consider a

hypothetical in which Rule 23 was never promulgated. Section 7 standing alone obviously would not provide employees any right to seek class certification in federal court. Under the Board's view, this purported right grew out of Section 7 with the adoption of Rule 23. The Board construed Rule 23 as expanding employees' substantive rights under Section 7, which, if the Board were right, would violate the REA.

Conversely, the Board viewed Rule 23, when combined with Section 7, as limiting parties' substantive rights under the FAA to agree to procedures governing their arbitrations. If it were right, this also would violate the REA. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. __, 133 S. Ct. 2304, 2309-10 (2013) (an entitlement to class proceedings would abridge or modify substantive rights, in violation of the REA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (under the REA, "Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action under Title VII).

The Board's attempt to create a substantive, non-waivable right to class procedures is at odds with Rule 23, the Federal Rules and other standards governing procedures for adjudication. Courts have held

repeatedly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). State class action procedures are treated similarly. *See, e.g.*, *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) (holding there is no "substantive right to pursue a class action" in either state or federal court).

C. A purported NLRA right to class procedures conflicts with the FLSA.

The collective adjudication of FLSA claims is governed by section 216(b) of the FLSA. The Board failed to consider that individual arbitration is fully consistent with the purposes underlying Section 216(b).

Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to ***limit*** the number of collective actions filed and require every employee who participates in such actions to give his or her ***individual*** consent to be a party-plaintiff. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). No rational basis exists for finding an

arbitration agreement that includes a waiver of class procedures interferes more with employees' purported right to engage in concerted activity than the FLSA's own individual opt-in requirement, which is waivable.

Moreover, the procedures for identifying and notifying putative collective action members of their opportunity to opt into an FLSA collective action have been developed by courts through their inherent, discretionary authority to manage cases. *Hoffmann-La Roche, Inc.*, 493 U.S. at 165. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in exercising judicial discretion.

D. A purported NLRA right to "invoke" class procedures is unreasonable because the Board cannot mandate class or collective certification.

Irrespective of the Board's construction of the NLRA, a court may deny an employee's motion for class or collective action certification. The Board conceded Section 7 cannot grant employees a "right to class certification" and that employers may oppose employees' motions for certification without violating their Section 7 rights. 357 NLRB at 2286 & n.24.

To overcome this obstacle, the Board held Section 7 guarantees employees only a limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." *Id.* (emphasis added). However, this limited "right" (to act concertedly by ***invoking*** Rule 23 and ***seeking*** class certification) makes no sense in practice.

An individual employment arbitration agreement does not abridge any purported right to concertedly "seek" class certification and "invoke" Rule 23 procedures, any more than would an employer's filing an opposition to an employee's motion for class certification – which *Horton I* admits is permissible. ***An arbitration agreement does not prevent employees from filing a class action lawsuit that "seeks" class certification and "invokes" Rule 23.*** Pursuant to an individual arbitration agreement, the employer may respond to such a lawsuit by moving to stay or dismiss the action and compel individual arbitration. But *Horton I* fails to identify any rational difference ***for Section 7 purposes*** between an employer's responding to a class action lawsuit with a successful motion to compel individualized arbitration and

responding with a successful opposition to class certification. ***In each instance, by the time the employer files its motion, the employee will have taken "the collective action inherent in seeking class certification" and will have acted concertedly by "invoking" class certification procedures.*** The Board failed to explain why employees will not have already fully exercised the very narrow alleged right identified by *Horton I* whenever they file a class action complaint ***invoking*** Rule 23 and Section 216(b). Further, *Italian Colors* forecloses any argument employees have a non-waivable right under the NLRA to try to satisfy Rule 23's requirements. 133 S. Ct. at 2310.

E. A purported NLRA right to class procedures is unreasonable and impermissible on numerous other grounds.

The Board ignored a host of other considerations – nearly all outside its authority and expertise – that further render its holding in *Horton I* unreasonable.

1. The Board ignored the purposes of class procedures.

Class procedures allow courts to balance the interests of judicial efficiency with the demands of due process in adjudicating claims common to multiple litigants. 1 MCLAUGHLIN ON CLASS ACTIONS §1:1

(8th ed.). There is no basis in the NLRA, the Federal Rules, or case law for the Board's novel presumption class procedures must also serve concerns under the NLRA.

2. The Board ignored protections and incentives for employees to pursue legal claims that do not depend on class procedures.

The Board failed to consider class procedures are unnecessary for employees to succeed in court or arbitrations on individual legal claims. Federal and state statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis.

Federal and state agencies also remain empowered to pursue class or collective actions on behalf of employees irrespective of employees' arbitration agreements waiving such procedures.

3. The Board ignored parties' substantial interests in individual arbitration.

The Board failed to consider that federal law recognizes individual employment arbitration yields benefits ***to employees*** and public by reducing the burdens and costs of litigation while preserving individuals' ability to vindicate their claims. *E.g.*, *Circuit City Stores, Inc.*, 532 U.S. at 122-23. Employers also have a legitimate interest in

agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of an employee's claim on its merits while avoiding substantial costs and risks of putative class litigation that are unrelated to the merits of a claim.

4. The Board rendered most employment arbitration agreements unenforceable.

Most employment arbitration agreements, if they do not expressly waive class procedures, are silent concerning them. The default position in interpreting arbitration agreements that are silent on class arbitration ***is to construe them as not permitting it***. *Stolt-Nielsen*, 559 U.S. at 685-86. ***In light of* Stolt-Nielsen*, most employment arbitration agreements would violate Section 7 under* Horton I.** *See Countrywide Fin. Corp.,* 362 NLRB No. 165 (Aug. 14, 2015) (extending *Horton I* to hold an employer violated Section 7 ***simply by moving to compel individual arbitration*** under an agreement that was ***silent*** regarding class procedures based on *Stolt-Nielsen*).

5. The Board wrongly presumed individuals who file class action complaints seek to initiate group action.

The Board's unfounded presumption in *Horton I* that "an individual who files a class or collective action regarding wages, hours

or working conditions" necessarily "seeks to initiate or induce group action" is simply untrue. 357 NLRB at 2279. Under the Federal Rules, individual plaintiffs can, and often do, make collective or class allegations solely for their own benefit. An attorney representing an individual employee may make such allegations – which implicitly threaten extensive and burdensome discovery – hoping to raise the stakes for the defendant and obtain a quicker or larger settlement ***on behalf of the individual***.

For all these reasons, *Horton I* is unreasonable and impermissible.

V. The MAA cannot reasonably be read to prohibit employees from filing unfair labor practice charges.

The Board wrongly held Hobby Lobby employees would reasonably misconstrue the MAA as restricting their access to file charges with the Board. JA.252. This finding lacked substantial evidence.

No employee could reasonably misinterpret the MAA as prohibiting Section 7 activity, including filing unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality

clause lawful when it expressly excluded protected concerted activity from its coverage). The MAA expressly advises employees it does ***not*** apply to their filing complaints with federal or state agencies. The MAA states:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (***including the right to file claims with federal, state or municipal government agencies***).

JA.108, 168 (emphasis added).

The Fifth Circuit recently made clear that it would ***not*** be reasonable for employees to read an arbitration agreement like the MAA as prohibiting the filing of charges with the Board where the agreement states explicitly that it does not do so. *Murphy Oil*, 2015 WL 6457613, at *5.

Here, the MAA explicitly states it does ***not*** apply to employees' "right to file claims with federal, state or municipal government agencies." JA.108, 168. Accordingly, it would be unreasonable for employees to read the MAA otherwise.

Neither the General Counsel nor the Charging Party offer ***any evidence*** that any employee has ever misinterpreted the MAA as

prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. Because of the explicit statement in the MAA it does not prohibit such complaints, any such alleged misinterpretation of the MAA would be manifestly unreasonable.

VI. The Board's ordered remedy violates Hobby Lobby's First Amendment right to petition the Government.

Relying on *Murphy Oil I*, slip op. at 19-20, the Board held Hobby Lobby engaged in an unfair labor practice simply by filing ***successful*** motions to compel individual arbitration based on well-established Supreme Court precedent, including by filing motions to compel in *Fardig* and *Ortiz*. JA.251-52. The Board ordered Hobby Lobby to reimburse employees for any litigation costs relating to its motions to compel.[14] JA.254-55.

The remedies ordered by the Board are improper and unenforceable because Hobby Lobby did not engage in any unfair labor practices. The proposed remedies would deprive Hobby Lobby of its rights under the First Amendment to petition the government.

[14] The Board also found – without substantial evidence –Hobby Lobby violated Section 7 by filing a motion to compel individual arbitration in *Ortiz* – a single-plaintiff case. JA.277 n.3. But there was no evidence the lone plaintiff in *Ortiz* was engaged in concerted activity.

As summarized by this Court:

> To be enjoinable . . . [a] lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law."

Murphy Oil II, 2015 WL 6457613, at *6 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 737 n.5, 744, 748).)

Here, two district courts granted Hobby Lobby's motions to compel individual arbitration under the MAA. *See Fardig*, 2014 WL 2810025; *Ortiz*, 52 F. Supp. 3d 1070. These rulings are *per se* evidence Hobby Lobby's motions to compel had a reasonable basis in law. Both courts rejected arguments the MAA was unenforceable based on the NLRA, and the Board should be bound by collateral estoppel based on those decisions. *See, e.g.*, *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 38 (1st Cir. 1987) (finding Board was collaterally estopped from re-deciding contract-formation issues already decided by district court).

As in *Murphy Oil II*, there is no basis to find Hobby Lobby's enforcement of its MAA was baseless, retaliatory, or with an objective illegal under federal law. The evidence shows only that certain employees sued in breach of the MAA and Hobby Lobby, relying on

extensive federal case law, defended itself by seeking to enforce the MAA.

The Board's finding that Hobby Lobby's enforcement of the MAA was unlawful was based only on the Board's decisions in *Horton I* and its progeny. However, the Fifth Circuit recently rejected a similar finding in *Murphy Oil II*. There, the Fifth Circuit explained:

> Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

2015 WL 6457613, at *6.

Here, Hobby Lobby likewise relied on multiple federal and state court decisions in moving to compel arbitration under the MAA. Although the Board may disagree with those decisions, that disagreement does not mean Hobby Lobby had no basis in fact or law or an "illegal objective" in relying on them. Those decisions, including *D.R. Horton II* and *Murphy Oil II*, remain good law in most jurisdictions where Hobby Lobby does business and have not been overruled by the Supreme Court.

Because Hobby Lobby had a constitutional right to petition the courts, and its motions did not fall under any *Bill Johnson's* exception, the Board's decision, remedy, and order must not be enforced.

CONCLUSION

Hobby Lobby asks this Court to decline to enforce the Board's Order and award it any further relief to which it may be entitled.

Respectfully submitted,

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